24 DEC 1975

MEMORANDUM FOR: Associate Deputy Director for Administration

SUBJECT : Secrecy and Protection of Intelligence Sources and Methods

REFERENCE : Request for comments on Subject from Associate DD/A, dated 19 December 1975

1. This memorandum is for information only.

2. Pursuant to your request, the Office of Security has reviewed the Office of General Counsel paper, "Secrecy and Protection of Intelligence Sources and Methods." We found it somewhat difficult to deal with the paper because a specific target was obscure at the outset. We concur with the author's conclusion that no changes in existing law should be recommended at least until completion of the various studies under way in the Executive Branch.

3. The author's conclusion that the substitution of a statutory classification system for Executive Order 11652 is not the primary vehicle for protecting information furnished to Congress concerns us somewhat. However, realizing that his conclusion is based partly on his sensitivity to the current political climate, we have no real basis for argument. It is difficult to be optimistic but we would like to think that Congress can be convinced that it is in the national interest to have an effective intelligence system, and that inherent in the need for intelligence is the need to preserve the ability to collect and produce it. If any disclosure causes or has the potential for causing the loss of an intelligence source or method, the intelligence may be lost or diminished in value. This could deny to the policy-makers information which they need to help preserve the nation's security. Therefore, intelligence sources and methods clearly are national security information as defined in Executive Order 11652.

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4. If and when it is decided to recommend new legislation, such legislation should include the concept that intelligence is a vital part of the nation's security and should: (a) provide authority to classify intelligence product, sources and methods; (b) provide elasticity for the retention of classification as long as necessary to protect sources and methods; (c) provide legal means for dealing with unauthorized disclosures; (d) be applicable to all, not just the Executive Branch; and (e) provide for appropriate review by Congress to prevent abuse.

5. It would appear that a major stumbling block in obtaining new legislation is the apparent special concern of Congress that secrecy might be used to cover abuses in the covert action area. For the sake of enhancing the possibility of obtaining adequate legislation for the protection of intelligence sources and methods, it is suggested that consideration be given to the concept of distinguishing between intelligence and covert action.

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Acting Director of Security

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Secrecy and Protection of Intelligence Sources and Methods

I. General

1. The concept of protection of intelligence sources and methods is not identical with that of secrecy of intelligence activities. Secrecy is required with respect to intelligence itself. Often it is difficult to distinguish between intelligence and sources and methods, or to separate the two. Further, in many cases the time comes when the intelligence product no longer requires the protection of secrecy because of its content, but does need to remain secret because its disclosure might also disclose sources or methods for which there is a continuing need for secrecy. This paper addresses both secrecy in the intelligence area generally and the narrower area of protection from disclosure of intelligence sources and methods information.

2. It should be emphasized that the basic legal problem is an affirmative one--to make certain that necessary secrecy can be maintained. It is only because the former must be accomplished that the secondary need--to guard against and prevent undue secrecy and to make certain that necessary secrecy not be a vehicle for non-disclosure of any wrongdoing--comes into play.

II. Undue Secrecy

3. To address first the latter problem, that of undue secrecy, that issue essentially is one of improved and effective oversight and management, subjects to be covered in other papers. Rockefeller and Murphy commissions'

recommendations in this area are now in various stages of review and implementation. To a degree, any undue secrecy also can be a matter of improper implementation of Executive Order 11652. An interagency study of the workings of that order, together with other aspects of the management of classified information, has been instituted and appropriate recommendations may be expected from that source.

III. Providing Necessary Secrecy

4. The secrecy practices and mechanisms of the intelligence agencies are built on law deriving from all three branches of Government. From executive branch authority, Executive Order 11652 is certainly the basic working tool. Statutory authorities are provided by the National Security Act of 1947 (Tab A) (and implemented by NSC, DCI and departmental directives and regulations) and the CIA Act of 1949 (Tab B), both applicable as to CIA, and the former having some application also to sources and methods activities of the intelligence agencies generally. For the National Security Agency, Public Law 86-36 (Tab C) provides authority for secrecy of activities. Exemptions from certain provisions of the Code, mostly title 5 provisions, permit CIA and NSA to refrain from certain disclosures. Judicial decisions have long recognized and upheld the authority of the President in foreign relations and defense and intelligence areas. In Totten v. U.S. (92 U.S. 105 (1876)), for example, the court upheld the principle of non-disclosure of sources. "If upon contracts of such a nature an action against the government could be

maintained in the Court of Claims, whenever an agent should deem himself entitled to greater or different compensation than that awarded to him, the whole service in any case, and the manner of its discharge, with the details of the dealings with individuals and officers, might be exposed, to the serious detriment of the public. A secret service, with liability to publicity in this way would be impossible; and, as such services are sometimes indispensable to the Government, its agencies in those services must look for their compensation to the contingent fund of the department employing them, and to such allowance from it as those who dispense that fund may award. The secrecy which such contracts impose precludes any action for their enforcement. The publicity produced by an action would itself be a breach of a contract of that kind, and thus defeat a recovery." The Marchetti case, in 1972, is a landmark decision enforcing secrecy agreements not to disclose classified information.

5. In practice, there would seem to be several major areas of difficulty in maintaining secrecy, specifically, problems under the Freedom of Information Act, classification and declassification problems under the Executive order, problems arising from the disclosure of classified information to Congress, the absence of criminal law for the protection of sources and methods information, and the absence of statutory injunctive protection. As suggested at an earlier meeting of the Second Study Group, this is not the occasion to address the matter of revising the Freedom of Information Act and, as indicated earlier, any modification of the Executive order should await the current study of Executive Order 11652.

6. Secrecy As to Information Furnished Congress. Physical protection, access restrictions, secrecy agreements--these normal administrative measures by which agencies protect classified information under Executive Order 11652--generally can be applied when classified information is furnished to Congress. The major danger peculiar to the congressional situation arises when there is an intent of public disclosure by Congress without executive branch agreement, as in the recent Pike Committee incident. The agreement reached with the Pike Committee--i.e., agency/committee disagreement, Presidential certification and committee resort to the courts--seems the logical and workable action in this area.

7. Alternatively substitution of a statutory classification system for the Executive order classification system could avoid at least some of the problems of executive-congressional disagreement since the statute could be made applicable to all, not merely the executive branch. But there are several problems with this approach. One is that the statute might be written so as not to apply to congressional members and staffs. Additionally, any new statutory system might be considered insufficient from the executive's point of view. Also, there would be constitutional implications concerning the authority of Congress to restrict the President's authority in foreign affairs and defense.

8. Criminal Law Protection for Sources and Methods. For some time, the Director and the intelligence community have been concerned with the

absence of criminal law penalizing the disclosure of sources and methods information by past and present Government employees, employees of contractors and others furnished such information by virtue of their relationship with the Government. CIA and the Department of Justice have been negotiating the development of an appropriate bill and it seems probable that an agreed bill will be ready for submission to OMB early in the year. The essential problem with existing criminal law is that it is limited in scope (information concerning military installations and facilities, for example) or requires an intent to injure the United States or aid a foreign power, and, as such, does not reach the case of the former employee who simply elects to publish. This is particularly true when the information to be published is only an identification of intelligence sources, and even more so, if the source is no longer a productive one. Moreover, existing law is now in the process of change as S. 1 and related bills proceed on their tortuous course.

9. Protection by Injunction. The criminal legislation being developed also would empower the courts to enjoin the disclosure of classified sources and methods information again, however, applicable only to those who acquire information by virtue of their association with the Government. This approach is potentially the most valuable of all, since the possibility of an injunction against the author might deter publishers from committing resources to the preparation of a publication which might never become available, that is, the author might deter publishers from committing resources to the

preparation of a publication which might never become available, that is, the author might be enjoined from proceeding. Further, since the injunction would involve a civil, rather than criminal procedure, greater protection for the information during the course of the necessary litigation should be possible. And finally, injunction founded on statute would be on sounder footing than one resting on the existence of a secrecy agreement, as in the Marchetti decision.

IV. Conclusion

10. The foregoing suggests that no changes in existing law should be recommended at this time. Executive branch agreement on sources and methods legislation is being worked out elsewhere and will go forward when agreement is reached. Similarly any revision to Executive Order 11652 is for study elsewhere within the executive branch. In any event, it seems likely any changes in that order would involve essentially changes in detail or procedure. It suggests that the substitution of a statutory classification system for the Executive order is not the primary vehicle for protecting information furnished to Congress and would be undesirable for other reasons.

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Att: DD/A 75-6051 (Tab C only)

Remarks:

Your comments are requested by COB, Monday 22 December 1975.

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John N. McMahon
Associate Deputy Director
for
Administration

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